Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

SEA-LAND SERVICE, INC.,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; SIR GEAN AMOS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* ("APA"), allows a Court of Appeals to adopt a substantive rule of evidence that is contrary to the long established rule of evidence adopted by an administrative agency, when the agency's substantive rule of evidence is a reasonable interpretation of the statute Congress entrusted to the agency to administer and the agency's substantive rule of evidence is consistent with the evidentiary rules of the APA.

2. Whether a rule of evidence directing that in proceedings under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* ("LHWCA"), the trier of fact must assign greater weight to a treating physician's opinion and accept that doctor's opinion, unless it is shown by other medical testimony to be unreasonable, conflicts with decisions of the Third, Fourth and Seventh Circuits that have rejected or declined to adopt a rule of special deference for the opinions of treating physicians.

3. Whether the Ninth Circuit's adoption of such a rule in this case impermissibly substitutes the court's view of the evidence for that of the administrative law judge.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The petitioner, Sea-Land Service, Inc., and its claims administrator, Crawford & Company, were respondents before the Ninth Circuit Court of Appeals. The Director, Office of Workers' Compensation Programs, was also a respondent in that proceeding. Crawford & Company has no direct interest in the outcome of this petition.

The respondent, Sir Gean Amos, was the petitioner before the Ninth Circuit Court of Appeals.

The Court of Appeals case number was 96-70988. The Benefits Review Board case number was BRB No. 94-0892. The Office of Administrative Law Judges case number was 92-LHC-3571.[1]

Petitioner Sea-Land Service, Inc., makes the following statement pursuant to Supreme Court Rules 14(b) and 29.6 to identify all parent companies and nonwholly owned subsidiaries:

CSX Corporation, a corporation organized under the laws of the Commonwealth of Virginia, owns 100 per cent of the authorized and issued shares of common stock of Sea-Land Service, Inc., a corporation organized under the laws of the State of Delaware. CSX Corporation's stock is traded regularly on an established securities market in the United States.

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[1] The matter before the administrative law judge bore four case numbers emanating from work-related incidents on July 25, 1990, September 19, 1991, November 18, 1991 and February 12, 1992. The injury at issue here arose from the July 25, 1990 event. (App. 33, n.3)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Sea-Land Service, Inc., respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, entered on September 1, 1998 and amended on January 12, 1999.

OPINIONS BELOW

The Order and Amended Opinion of the Court of Appeals for the Ninth Circuit is reprinted in Appendix A and is reported at 164 F.3d 480 (9th Cir. 1999), and at 1999 WL 8000 *1 (C.A. 9 1999). The Order of the Court of Appeals is reprinted in Appendix B hereto and is reported at 153 F.3d 1051 (9th Cir. 1998).

The Benefits Review Board did not enter a decision in this case: by operation of Pub.L. 104-134, the decision of the administrative law judge was considered affirmed by the Board on September 12, 1996, and the Board's final order for purposes of obtaining review in the United States court of appeals. Notice from the Clerk of the Benefits Review Board so informing the parties is reprinted at Appendix C.

The Decision and Order Awarding Benefits of Administrative Law Judge Ellin M. O'Shea issued February 16, 1994 is not reported. The decision and order is reprinted at Appendix D.

JURISDICTION

Respondent's (claimant's) claim under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.*, was heard before the Office of Administrative Law Judges pursuant to 33 U.S.C. § 919. The administrative law judge's decision and order was appealed by respondent to the Benefits Review Board pursuant to 33 U.S.C. § 921(b). Pursuant to Pub.L. 104-134 (Omnibus Consolidated Rescission and Appropriations Act of 1996), the decision on review was considered affirmed by the Board, and the Board's final order for purposes of obtaining review in the Court of Appeals, when it had been pending before the Board for more than one year and not acted on before September 12, 1996.

The Court of Appeals for the Ninth Circuit had jurisdiction to review the final order of the Board under 33 U.S.C. § 921(c).

The Opinion of the Ninth Circuit Court of Appeals was filed on September 1, 1998. Sea-Land filed a timely petition for rehearing and suggestion for rehearing *en banc*. The court's Order and Amended Opinion was filed on January 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The provisions of 5 U.S.C. § 556(d) and 5 U.S.C. § 706 are reproduced in the Appendix at App. 48 and App. 49. The provisions of 33 U.S.C. § 907(b) are reproduced in the Appendix at App. 50. The provisions of 33 U.S.C. § 919(a)

and (d) and 33 U.S.C. § 921(b)(3) are reproduced in the Appendix at App. 51 and App. 52. The provisions of 20 C.F.R. § 702.407 are reproduced in the Appendix at App. 53. The provisions of 20 C.F.R. § 802.301 are reproduced in the Appendix at App. 54.

STATEMENT OF THE CASE

This case involves a claim by an injured worker for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.* (LHWCA). Sir Gean Amos was employed by Sea-Land Service, Inc., as a warehouseman loader/checker on July 25, 1990 when a "cheater bar" he had been using to tighten chains to secure cargo on a flatbed trailer sprung up and hit him in the face. (App. 25.) As found by the administrative law judge, the blow caused claimant to fall to the deck of the trailer backward across a 12" x 12" piece of timber, resulting in injury to both shoulders and his back. (App. 32.)

Claimant was off work for a year following the incident, and under the care of Rayburn Lewis, M.D., an internal medicine and sports medicine specialist, for treatment of soft tissue injury to his back and shoulders. The employer paid claimant compensation during that period. He returned to work in July 1991, but ceased work again in February 1992 with complaints of recurrent right shoulder pain. (App. 24, 26.)

In January 1992 Dr. Lewis opined that claimant's complaints, although mostly subjective, were work-related; but that no further diagnostic or significant treatment regimen, other than a good fitness program, would

be useful (concurring with a similar conclusion by a panel of independent medical examiners a few months earlier). (App. 26-27, 38-39.) In February 1992 the claimant complained of progressive right shoulder pain which he related to his work at Sea-Land. Dr. Lewis noted no change in examination findings, and wrote that his opinion had not changed from the previous month's examination; but he referred claimant to orthopedic surgeon Larry Pedegana, M.D., for orthopedic consultation. (App. 26-27.)

Dr. Pedegana diagnosed a right shoulder impingement syndrome secondary to a spur in the shoulder joint, and recommended surgery for removal of the spur and decompression of the shoulder. (App. 26, 35.) Sea-Land disputed any causal relationship between the shoulder injury and the July 1990 industrial accident. In August 1992 the claimant was examined by orthopedic surgeon Kenneth Sawyer, M.D., for pain in both shoulders and the upper back area referable to an on-the-job injury or flare-up in November 1991. Dr. Sawyer felt that although the surgery recommended by Dr. Pedegana might improve the claimant's right shoulder symptoms, it probably would not totally alleviate them. He opined that if claimant felt he currently could not return to his previous work because of ongoing symptoms in his left shoulder and back in addition to the right shoulder symptoms, it was unlikely that he would do so after surgery. (App. 32-33.)

In April 1993 the claimant was examined at Sea-Land's request by orthopedic surgeon Stephen Sears, M.D. Dr. Sears concluded that claimant did not have a right shoulder impingement syndrome. He did not

believe that the small bone spur reported in the tomogram study obtained by Dr. Pedegana was of significance, and he did not feel that the claimant would benefit from the shoulder surgery recommended by Dr. Pedegana. Dr. Sears' diagnoses were strain of the shoulders, right greater than left (which he related to the July 25, 1990 injury), and chronic thoracolumbar strain (which he felt was related to a 1983 injury and not significantly aggravated by the July 1990 injury). He felt with regard to both diagnoses that the claimant was fit for employment without restrictions. (App. 33-34.)

The case was tried on November 3, 1993 before an administrative law judge on disputed issues of causation, nature and extent of disability, and the reasonableness and necessity of medical treatment recommended by Dr. Pedegana. Medical records pertaining to claimant's injury and disability history as far back as 1983 were admitted into evidence, as well as contemporaneous records of treatment and evaluation of the July 1990 injury. (App. 23.) Dr. Pedegana and Dr. Sears each testified by deposition. (App. 34.)

In a Decision and Order Awarding Benefits dated February 16, 1994, the administrative law judge found that claimant did injure his shoulders and back in the July 25, 1990 work incident, and that his condition was medically fixed and stable and had reached maximum medical improvement when he was seen by independent medical examiners Philip Grisham, M.D. and Loy Cramer, M.D. on November 8, 1991. (App. 43.) The administrative law judge found that the employer, through its vocational rehabilitation expert, had established that claimant has an inflation-adjusted alternative wage-earning capacity of

$5.45 to $9.10 per hour if it were found that he could not perform his usual work; but that by the more persuasive of the conflicting medical evidence, he can perform his usual work activities without the recommended surgery. (App. 41.) Based on medical evidence that claimant might be expected to have incidents of acute right shoulder pain associated with some work activities, the administrative law judge held that an award of compensation for five per cent wage loss disability was warranted. (App. 41-42.)

On the issue that gives rise to this petition, the administrative law judge found that the right shoulder surgery recommended by Dr. Pedegana in 1992 was not reasonable and appropriate medical treatment for the industrial injury under Section 7 of the Act, 33 U.S.C. § 907; and she denied claimant's request for such. (App. 41, 47.) The administrative law judge took note of Dr. Pedegana's impressive credentials, and noted that both he and Dr. Sears are board-certified. (App. 38.) She stated that she had weighed the fact that Dr. Pedegana was involved with claimant on a treating basis, as well as the fact that employer's consultants examined claimant in connection with a controverted claim. (App. 36.) She concluded that Dr. Sears had a far fuller appreciation of the details of Amos's medical background, and performed a far fuller medical and orthopedic examination, whereas Dr. Pedegana had only Dr. Lewis's evaluations and his examination focused solely on claimant's shoulders. She concluded that Dr. Sears considered the claimant's total orthopedic conditions, singly and in combination, and that Dr. Pedegana did not. (App. 36.) The ALJ noted that Dr. Sears' evaluation of Amos was more current, by a

year, than Dr. Pedegana's, and that Dr. Pedegana testified that he would have to preface his opinions by the fact that had not seen Amos in more than a year and did not know his current condition. (App. 36-37.) She concluded that Dr. Sears had done a more thoughtful, careful weighing of all he was presented with to reach judgments as to whether claimant had an impingement syndrome as well as whether any restrictions should be placed on his work activities. (App. 37.) She concluded that overall, Dr. Sears' opinions were more probative and persuasive, and his diagnosis was more persuasive, which she noted in turn bears on the disputed proposed surgery issue. (App. 38.) The administrative law judge found the claimant not credible or persuasive with respect to his subjective chronic pain complaints and his professed inability to work. (App. 40-41.)

The administrative law judge's decision and order awarded claimant compensation for permanent partial disability at the rate of $21.87 per week commencing February 13, 1992 and continuing. (App. 41-42.) Employer was directed to pay Dr. Pedegana's bill of $432.00, and any future necessary and reasonable medical expenses which are established as resulting from the injury; but claimant's request for right shoulder surgery as recommended by Dr. Pedegana was denied. (App. 46-47.)

Claimant appealed to the Benefits Review Board, arguing that the administrative law judge erred, (1) in affording greater weight to the opinions of the employer's examining physician than to the opinion of claimant's treating physician; (2) in concluding that claimant was not entitled to further medical treatment in the form of a CAT scan and surgery as recommended by

Dr. Pedegana; and (3) in concluding that claimant was not entitled to temporary total disability benefits but was capable of returning to his former occupation, and was entitled to permanent partial disability benefits based on a five per cent residual loss of wage-earning capacity. By operation of Pub.L. 104-134 the appeal was considered affirmed by the Board as of September 12, 1996, and the final order of the Board for purposes of obtaining review in the United States courts of appeal. (App. 20.)

Claimant filed a timely petition for review with the United States Court of Appeals for the Ninth Circuit, arguing the same three issues he had raised before the Benefits Review Board. (Opening Brief of Petitioner, p. 2.) The employer responded urging affirmance of the administrative law judge's decision and order.

In its Opinion issued September 1, 1998, the Ninth Circuit held that where an injured employee seeks benefits under the LHWCA, a treating physician's opinion is entitled to special weight (App. 17); that Dr. Pedegana, Amos's treating physician with indisputable credentials, believed that surgery would help his patient, and that Drs. Sawyer and Sears, both well-qualified orthopedic surgeons, favored a more conservative course:

> But neither Sawyer nor Sears established that Pedegana's recommendation was unreasonable. . . . As the opinion of the treating physician, Dr. Pedegana's recommendation was entitled to special deference, and since that opinion was not shown by the testimony of the other doctors to be unreasonable, the ALJ's choice of one reasonable option over the other was not hers to make. It was the patient's. The

> ALJ's rejection of Dr. Pedegana's surgical recommendation as not reasonable and appropriate was not supported by substantial evidence.

(App. 19.) The Ninth Circuit reversed and remanded with instructions that the ALJ grant Amos's request for surgery and award him temporary total disability benefits until employer provides the surgery and it is determined that he has reached maximum medical improvement. (App. 19.)

Sea-Land petitioned the court below for rehearing on grounds that the court's holding on the medical issue adopted a new evidentiary standard for LHWCA cases and conflicts with settled law, and that the opinion impermissibly substituted the three-judge panel's view of the evidence for that of the administrative law judge, exceeding the court's review authority. (Petition for Rehearing and Suggestion for Rehearing En Banc, pp. 2-3.) Rehearing was also requested on the court's holding on the disability issue. (*Id.*, pp. 4-5.)

In its Order and Amended Opinion issued January 12, 1999, the three-judge panel of the Ninth Circuit denied the petition for rehearing but ordered that its Opinion be amended with respect to the court's instructions to the ALJ concerning determination of Amos's entitlement to temporary and permanent disability benefits on remand. Sea-Land's suggestion for rehearing en banc was rejected. (App. 1-2.) The amendment to the court's Opinion as to the disability issue is not at issue in this petition.

REASONS FOR GRANTING THE WRIT

1. The substantive rule of evidence adopted by the Ninth Circuit is contrary to the "substantial evidence" rule that has long been established as the standard of proof in LHWCA adjudications and which is a reasonable interpretation of the statute, and consistent with the evidentiary rules of the Administrative Procedure Act.

The issues before the Ninth Circuit concerned agency actions that are governed by the APA, and thus the standard for review is provided by the APA:

> . . . . The reviewing court shall –
>
> . . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) *unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute;* or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the

> reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706(2) (emphasis added) (App. 49). Where Congress has explicitly or implicitly delegated to an administrative agency authority to elucidate a provision of a statute the agency is charged with administering, a court may not substitute its own construction for a reasonable interpretation made by the agency. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-843.

Here, Congress *has* addressed the question of the standard of proof explicitly in the statute: Section 21(b)(3)

of the LHWCA, 33 U.S.C. § 921(b)(3), "Review of compensation orders", expressly provides that *substantial evidence* shall be the standard of proof: "The findings of fact in the decision and order under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." (App. 52.) Accordingly, the agency's own rules of procedure for review by the Benefits Review Board provide, at 20 C.F.R. § 802.301(a): "Such findings of fact and conclusions of law may be set aside only if they are not, in the judgment of the Board, supported by substantial evidence in the record considered as a whole or in accordance with law."

(App. 53.)

Thus, the substantial evidence standard of proof is declared by the Act itself, the agency's regulations, *and* the APA, as the standard for adjudications under the LHWCA. Under *Chevron*, the Court of Appeals is not empowered to substitute some other standard of its choosing: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843.

Moreover, this Court, the courts of appeal, and the Benefits Review Board have universally recognized and affirmed Congress's intent in that regard. This is an aberrant holding by the Ninth Circuit on a matter of great import to maritime employers and employees, insurers, and ultimately to merchants and consumers to whom the costs of workers' compensation claims are passed on; and it warrants further review by this Court.

A. The Ninth Circuit's opinion departs from settled law that the trier of fact is not bound to accept the opinion of any particular medical examiner, but may accept or reject all or any part of any witness's testimony.

The opinion below holds that in claims arising under the LHWCA where the administrative law judge is faced with conflicting treatment recommendations, both medically reasonable, the opinion of a treating physician is entitled to special deference; and the choice of one reasonable option over the other is not the ALJ's to make; it is the patient's. At first blush, that might not seem an entirely inappropriate holding; but Section 7 of the Act, 33 U.S.C. § 907, expressly delegates to the Secretary of Labor responsibility for supervision of medical treatment of injured workers:

> The Secretary shall actively supervise the medical care rendered to injured employees, shall require periodic reports as to the medical care being rendered to injured employees, shall have authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished, and may, on his own initiative or at the request of the employer, order a change of physicians or hospitals when in his judgment such change is desirable or necessary in the interest of the employee or where the charges exceed those prevailing within the community . . . .

33 U.S.C. § 907(b). (App. 50.)

Resolution of issues involving the reasonableness or necessity of medical treatment requires findings of fact and weighing of the evidence, and these functions rest

solely with the administrative law judge. *Jackson v. Universal Maritime Serv. Corp.*, 31 Ben.Rev.Bd.Serv. (MB) 103, 106-107 (1997).

Section 19(a) of the LHWCA, 33 U.S.C. § 919(a), specifies that the deputy commissioner (now administrative law judge[2]) shall have full power and authority to hear and determine all questions in respect of claims. (App. 51.) This Court has long held that if supported by evidence and not inconsistent with the law, the ALJ's inference is conclusive, and no reviewing court can set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the ALJ is factually questionable. *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 477-478 (1947). It is immaterial that the facts permit the drawing of diverse inferences. The ALJ alone is charged with the duty of initially selecting the inference which seems most reasonable, and his choice, if otherwise sustainable, may not be disturbed by the reviewing court. *Id.* The hearing officer's findings must be upheld if they are supported by substantial evidence. *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 467 (1968). "Substantial" evidence means the kind of evidence a reasonable mind might accept to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

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[2] The 1972 amendments to the LHWCA vested in the administrative law judges all powers, duties and responsibilities with respect to hearings theretofore vested in the deputy commissioners. 33 U.S.C. § 919(d). (App. 50.)

With respect to medical evidence, the decision below holds that the ALJ *is* bound by the opinion of the treating physician unless that opinion is shown by other medical testimony to be *unreasonable.*

The principles laid down in *Cardillo* and *Banks* and other opinions of this Court defining the administrative law judges' fact finding function have been universally followed by the courts of appeal and the Benefits Review Board. *See John W. McGrath Corp. v. Hughes,* 289 F.2d 403, 405 (2d Cir. 1961) (the reviewing body must respect the ALJ's evaluation of the credibility of all witnesses, including medical witnesses); *Kertesz v. Crescent Hills Coal Co.,* 788 F.2d 158, 163 (3d Cir. 1986) (Black Lung Benefits Act) (the ALJ is not bound to accept the opinion or theory of any given medical expert, "but may weigh the medical evidence and draw [her] own inferences"). *Mendoza v. Marine Personnel Co.,* 46 F.3d 498, 500-501 (5th Cir. 1995) (the ALJ determines the weight to be accorded to evidence and makes credibility determinations, and moreover, where the testimony of medical experts is at issue, she is entitled to accept any part of an expert's testimony or reject it completely); *Peabody Coal Co. v. Benefits Review Board,* 560 F.2d 797, 802 (7th Cir. 1977) (Black Lung Benefits Act) ("This process of crediting and discrediting the evidence, and drawing inferences from the credited evidence, is properly within the fact finder's competence. . . . [T]he trier of fact is not bound to accept any particular physician's diagnosis, but is free to draw his own inferences from the medical testimony"); *Duhagon v. Metropolitan Stevedore Co.,* 31 Ben.Rev.Bd.Serv. (MB) 98, 101 (1997) (ALJ's decision to credit the opinion of the examining physician over the contrary opinion of the

treating physician was neither inherently incredible nor patently unreasonable; the ALJ is entitled to evaluate the credibility of all witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner, but may draw her own inferences and conclusions from the evidence).

In *Walker v. Rothschild Int'l Stevedoring Co.*, 526 F.2d 1137, 1139-1140 (9th Cir. 1975), the Ninth Circuit held that "the Administrative Law Judge, as the trier of the facts, is the judge of the credibility of the witnesses, both lay and medical." Quoting with approval *Mid-Gulf Stevedores, Inc. v. Neuman*, 333 F.Supp. 430 (E.D. La. 1971), *rev'd on other grounds*, 462 F.2d 185 (5th Cir. 1972), that court added, "with respect to any conflict in the medical testimony offered by the parties, the Commissioner (Law Judge) is not bound to accept the opinion or theory of any particular medical examiner." *Walker*, 526 F.2d at 1140. Indeed, even in the decision below, the Ninth Circuit, in setting forth its standard of review, noted correctly that "[w]e must accept the ALJ's findings unless they are contrary to law, irrational, or unsupported by substantial evidence . . . . Substantial evidence means 'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " (App. 8.) But in the text of the opinion, *after conceding that each of the conflicting medical opinions was reasonable*, the court below held that the ALJ's rejection of Dr. Pedegana's surgical recommendation was "not supported by substantial evidence;" that since Dr. Pedegana's opinion "was not shown by the testimony of the other doctors to be unreasonable, the ALJ did not have

the option to choose one reasonable opinion over the other." (App. 9-10.)

B. The Ninth Circuit exceeded its review authority in this case and impermissibly substituted the court's view of the evidence for that of the ALJ.

In holding that the ALJ's rejection of Dr. Pedegana's surgical recommendation was not supported by substantial evidence, the court below first expressly acknowledged that *both the recommendation for surgery by Dr. Pedegana and the recommendation against surgery by employer's examining physicians were reasonable.* (App. 2.) Yet under the special deference rule applied by the court, "the choice of one reasonable option over the other was not [the ALJ's] to make. It was the patient's." (App. 9.)

Under the substantial evidence standard, there could be no serious question that the administrative law judge's crediting Dr. Sears' opinion over Dr. Pedegana's was supported by substantial evidence in the record. The ALJ did discuss, but to no avail, specifically and in detail the reasons why she was more persuaded by the opinions of the other physicians who recommended against shoulder surgery. See App. 35-39 and 40-42.

The court below *acknowledged* that both opinions were reasonable. (App. 2 ("Both recommendations were reasonable"); App. 9 ("the ALJ's choice of one reasonable option over the other was not hers to make.")) Dr. Sawyer, Dr. Sears and Dr. Pedegana are all board-certified in the same specialty – orthopedic surgery; and Dr. Sears, more so than Dr. Pedegana, had the benefit of not only

physically examining Amos with respect to *all* his symptoms and complaints, but also reviewing Amos's extensive previous medical and injury history which he – and the administrative law judge – found relevant. (App. 35-39, 40-42.)

2. The "special deference" rule adopted by the Ninth Circuit, a rule borrowed from Social Security Disability jurisprudence, is in direct conflict with decisions of the Third, Fourth and Seventh Circuits which have declined to find a requirement in LHWCA adjudications that treating physicians' opinions be given greater weight than opinions of other expert physicians.

The rule of deference to the opinion of a treating physician is firmly established in the law applicable to Social Security disability hearings. *See, e.g., Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995) (amended Apr. 9, 1996). But neither the utility nor the rationale of the rule as applied in Social Security hearings carries over to LHWCA adjudications. To the contrary, it runs counter to fair and evenhanded adjudications under the LHWCA.

In the Social Security forum, unlike adjudications under the LHWCA, benefits hearings are by their nature non-adversarial proceedings in which the ALJ has a basic duty of inquiry to fully develop the record. *Dixon v. Heckler*, 811 F. 2d 506, 510 (10th Cir. 1987); *see also Richardson v. Perales*, 402 U.S. 389, 403 (1968). Moreover, unlike the LHWCA, it is not settled whether the Administrative Procedure Act and its allocation of the burden of

persuasion[3] apply to Social Security disability hearings. *Richardson*, 402 U.S. at 409.

Most significantly in terms of cases such as this one, the LHWCA differs fundamentally from the Social Security Act in the respect that under the LHWCA, Congress charged the Secretary of Labor with responsibility for *actively supervising* the medical care rendered to injured employees – and gave the Secretary the authority to "determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished" to an injured employee. 33 U.S.C. § 907(b). (App. 50.) Accordingly, the Secretary has promulgated rules providing that the Director, OWCP, through the district directors, *shall actively supervise* the medical care of an injured employee covered by the Act. 20 C.F.R. § 702.407. (App. 53.)

The Ninth Circuit's decision in this case, that when a claimant is faced with competing medical opinions, each of them medically reasonable, "it is for the patient – not the employer or the ALJ – to decide what is best for him," overlooks that aspect of the ALJ's function in LHWCA cases.

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[3] *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 270-271 (1994). In striking down the so-called "true doubt" rule which was formerly widely applied in LHWCA cases by district directors, ALJs, the Board, and several courts of appeal, this Court held as a threshold matter that § 7(c) of the APA, 5 U.S.C. § 556(d), which provides that the proponent of a rule or order has the burden of proof, does apply to LHWCA adjudications. On the central issue, the Court held that a rule that "places the burden of persuasion on the party opposing the benefits award . . . would violate § 7(c)'s requirement that the burden of persuasion rest with the party seeking the award." *Id.* at 272.

The Second and Sixth Circuits have, in one form or another, applied the Social Security rule of deference in LHWCA and Black Lung Benefits Act cases. *See, e.g., Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1042 (2d Cir. 1997) (while credibility findings of an ALJ are entitled to great deference, "[a]n ALJ is nonetheless bound by the expert opinion of a treating physician as to the existence of a disability 'unless contradicted by substantial evidence to the contrary' " (citing Social Security disability decisions)); and *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042 (6th Cir. 1993) ("it is clearly established" that opinions of treating physicians are entitled to greater weight than those of non-treating physicians.) But neither of those courts has held, as the Ninth Circuit does here, that unless the treating physician's opinion is shown by other medical testimony to be *unreasonable*, a treating physician's opinion must be accepted over that of an examining physician even where the administrative law judge finds the bases for the examining physician's opinion more persuasive.

The courts in the Third, Fourth and Seventh Circuits have declined to apply a special deference rule in LHWCA and BLBA cases. In *Lango v. Director, OWCP*, 104 F.3d 573, 577 (3d Cir. 1997), the Third Circuit wrote: "[a]lthough there is some question about the extent of reliance to be given to a treating physician's opinion where there is conflicting evidence . . . the ALJ may permissibly require the treating physician to provide more than a conclusory statement before finding that pneumoconiosis contributed to the miner's death." That court, citing its opinion in *Lango*, recently expanded on its view of this issue in a memorandum opinion printed in

the Benefits Review Board Service (Matthew Bender) which, although concededly not of precedential value, is nevertheless instructive: "This court has never applied this proposition to LHWCA cases. In fact, it arguably has rejected its blind application outside of the social security disability context in favor of a preferred reliance on the reasoning underlying conclusions of a treating, or any, physician."

Kreschollek v. Southern Stevedoring Co., 31 Ben.Rev.Bd.Serv. (MB) 169(CRT), 171(CRT) (3d Cir. No. 96-3584, Mem. Op. Sept. 1997).

In *Sterling Smokeless Coal Co. v. Director, OWCP*, 131 F.3d 438 (4th Cir. 1997), the Fourth Circuit, citing its prior decision in *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093 (4th Cir. 1993), noted:

> [W]e observed that 'as a general matter the opinions of treating and examining physicians deserve especial consideration,' but we explained that '[n]either this circuit nor the Benefits Review Board has ever fashioned either a requirement or a presumption that treating or examining physicians' opinions be given greater weight than opinions of other expert physicians.'

Sterling, 131 F.3d at 441.

The Seventh Circuit, in *Amax Coal Co. v. Beasley*, 957 F.2d 324 (7th Cir. 1992), reversed the Board's affirmance of a decision and order in which the administrative law judge stated he had given little weight to the opinion of the employer's well-qualified medical expert who had not examined the claimant but reviewed his medical records and test results, holding that "ALJs cannot afford

more weight to an examining physician's opinion solely because that doctor personally treated the claimant." *Beasley*, 957 F.2d at 327.

The Fifth Circuit has declined to review the relative weight assigned to physicians' testimony by the ALJ. *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981).

Sea-Land does not quarrel with the general proposition that in LHWCA proceedings, a treating doctor's opinion is entitled to *due consideration* by the trier of fact. Indeed, it is clear from the authorities cited above that the ALJ must weigh all of the relevant evidence and draw his or her own inferences from it. And even in the Social Security forum the weight to be accorded to a treating doctor's opinion depends on the extent to which it is supported by clinical findings. *Coats v. Heckler*, 733 F.2d 1338, 1340, n.4 (9th Cir. 1984.) But in the instant case, the bar has been raised much higher. Under the Ninth Circuit's holding, the ALJ's discretion in deciding questions of the reasonableness or necessity of medical care has essentially been removed: a treating doctor's treatment recommendations must be accepted unless shown by other medical evidence to be unreasonable – even if the ALJ finds the contrary medical opinion more persuasive.

CONCLUSION

For the reasons stated above, petitioner's Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED this 12th day of April, 1999.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIR GEAN AMOS, *Petitioner,* v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; SEA-LAND SERVICES, INC.; CRAWFORD & COMPANY, *Respondents.*	No. 96-70988 OWCP Nos. 14-102839 14-108034 14-109438 14-110096 BRB No. 94-892 ORDER AND AMENDED OPINION

Petition for Review of an Order of the
Benefits Review Board

Argued and Submitted
April 8, 1998 – Seattle, Washington

Filed September 1, 1998
Amended January 12, 1999

Before: Procter Hug, Jr., Chief Judge, Stephen Reinhardt and Barry G. Silverman, Circuit Judges.

Opinion by Judge Silverman

COUNSEL

James K. Woods, Woods and Stauffer, Dallesport, Washington, for the petitioner.

Russell A. Metz and Robert J. Burke, Metz & Associates, Seattle, Washington, for the respondents.

ORDER

It is ordered that the Opinion filed on September 1, 1998, be amended to delete the final paragraph reported on page 10084 of the Slip Opinion and to substitute the following paragraph in its place:

> We remand to the ALJ with instructions to grant Amos's request for surgery and to redetermine, consistent with this opinion, Amos's entitlement to temporary disability benefits from February 13, 1992 pending his maximum medical improvement, and if appropriate thereafter, permanent disability benefits.

With these amendments, the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

OPINION

SILVERMAN, Circuit Judge.

Sir Gean Amos injured his shoulder while working as a loader/checker for Sea-Land Service and sought treatment and benefits under the Longshore and Harbor Workers' Compensation Act. His treating orthopedic surgeon recommended surgery. Two other orthopedic surgeons recommended against it. Both recommendations were reasonable. We hold today that when an injured

employee is faced with competing medical opinions about the best way to treat his work-related injury, each of them medically reasonable, it is for the patient – not the employer or the ALJ – to decide what is best for him. Since substantial evidence established the reasonableness of the surgical option, the ALJ's denial of Amos's request for the surgery was erroneous. We grant the petition and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Amos was injured on July 25, 1990 when a steel bar he was using to secure a load struck him in his face, causing him to fall across a railroad tie and injure his shoulders, back, and neck. He returned to work one full year later, on July 25, 1991, but then worked only until shoulder pain caused him to stop on February 13, 1992. One of the doctors who previously had treated Amos referred him to Dr. Larry Pedegana, an orthopedic surgeon who specializes in the treatment of upper extremities. None of the parties disputes Dr. Pedegana's qualifications, which include service as a physician and consultant for major league baseball and professional football teams.

Dr. Pedegana discovered a small spur under the surface of Amos's right acromion and diagnosed impingement syndrome secondary to the spur. He recommended surgery to remove the spur and to decompress the shoulder. Dr. Pedegana testified at his deposition approximately one year later that the proposed surgery probably would improve Amos's symptoms and physical functioning and obviate any work restrictions. Absent the surgery,

Dr. Pedegana would have restricted Amos to activity below shoulder level if his condition remained as it was at the time of treatment.

After obtaining Dr. Pedegana's recommendation, Sea-Land arranged for two other orthopedic surgeons to examine Amos. The first, Dr. Kenneth Sawyer, acknowledged that the surgery might improve Amos's symptoms, but did not recommend it. His report dated August 11, 1992 explained his position:

> . . . although the proposed surgery may improve the symptoms in his right shoulder, it is unlikely that he will be asymptomatic. It is also unlikely that he would be able to tolerate returning to his previous work if he cannot do so at the present time because of ongoing symptoms in his left shoulder and back and because the proposed surgery will probably not make his right shoulder totally asymptomatic.

The second examining physician, Dr. Stephen Sears, who characterized his practice as 30 percent spinal problems, 30 percent knee problems, and 40 percent "a little bit of everything," examined Amos on April 7, 1993. He reported the following:

> . . . it is noted that the patient on this date does not have a clinical impingement syndrome. I also doubt that surgery will improve the patient's right shoulder complaints, and if I were the surgeon involved, I would be somewhat nervous about performing surgery on this individual. . . . Mr. Amos has no ratable impairment as a result of his employment, to include the events of July 25, 1990. Again, because of the patient's past history, I do have serious doubts

> as to his ability to work and tolerate his subjective complaints.

In his deposition one week later, Dr. Sears elaborated on his opinion:

> I can't say 100 percent that this individual can't be helped with surgery of his shoulder. There's a judgment decision here. But in my opinion he will not be helped with surgery. . . . I would be nervous about performing the surgery, primarily because I don't like doing surgery and have the patient come back and say Dr. Sears, I'm no better. And I think there's a good likelihood that this will happen. . . . I don't think he's going to be any better from this surgery. You know I could be wrong, but that's my opinion. . . . So I quite frankly look at the shoulder as a delaying tactic with regards to any surgery that might be done. I think you're going to have to face the central issues sooner or later and now's a good time. To me the issue is can this individual work in the job that he had or can he not? I think he can and I think that's the central issue that's going to have to be faced and I think surgery would merely put off dealing with that issue.

Sea-Land denied authorization for the shoulder surgery, and Amos requested a hearing. He claimed an entitlement to the shoulder surgery pursuant to section 907 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950 (1998), and temporary total disability benefits pursuant to section 908 until he reached the point of maximum medical improvement.[1]

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[1] Although Amos contends in his brief that he is entitled to a CAT scan, Dr. Pedegana, who initially recommended it, later

Alternatively, if the ALJ decided he already had reached the point of maximum medical improvement and would not benefit from surgery, Amos sought permanent partial disability benefits pursuant to section 908.

The ALJ made the following findings of fact and conclusions of law: (1) the accident on July 25, 1990 caused Amos's shoulder and back injuries; (2) the requested shoulder surgery was not reasonable and appropriate medical treatment for Amos's injury; and (3) Amos was entitled to permanent partial disability benefits corresponding to only a five percent loss of wage earning capacity. The ALJ's decision was based on her determination that Dr. Pedegana, Amos's treating physician, was less persuasive than Dr. Sears, one of the examining physicians. The ALJ explained why she chose to accept Dr. Sears's opinion and reject that of Dr. Pedegana:

> The fact Dr. Pedegana is involved with claimant on a treating basis . . . has been weighed in this evaluation, as has the fact employer's consultants examined and evaluated in connection with a controverted and litigated claim. . . . Dr. Sears' report reflects a far fuller elicitation of the claimant's complaints and history, a far fuller medical and orthopedic examination, inclusive of his back. Dr. Pedegana's reports appear more limited and cursory in comparison. . . . Further, Dr. Sears' evaluation is more current than that of Dr. Pedegana, a year earlier, and is the most current in the records. . . . Moreover, Dr. Sears'

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stated that it no longer was necessary because Amos had been given a tomogram instead. Since this point is uncontradicted, the CAT scan issue now is moot.

> explanations on deposition impressed as reflecting not only a fuller appreciation for claimant's total past orthopedic treatment and medical history, and a more detailed orthopedic examination, but also a more thoughtful, careful weighing of all he was presented with. . . . While Dr. Sears may treat and practice in eastern WA and Dr. Pedagana's CV is impressive, both are Board-certified and what is more weighty in analysis is the thoroughness and completeness of the expert's examination and report on the particular injured worker.

Amos petitioned for review by the Benefits Review Board, but because Amos's petition was pending before the Board for more than one year on September 12, 1996, the ALJ's Decision and Order was considered affirmed and treated as the Board's final order pursuant to Public Law 104-134.

Amos raises three interrelated issues on appeal to this court: (1) whether the ALJ erred in affording greater weight to the opinion of Sea-Land's examining physician, Dr. Sears, than to the opinion of the treating orthopedic surgeon, Dr. Pedegana; (2) whether the ALJ erred in concluding that Amos was not entitled to shoulder surgery; and (3) whether the ALJ erred in concluding that Amos was not entitled to temporary total disability benefits, was capable of returning to his former occupation, and was entitled to benefits corresponding to only a five percent loss of wage earning capacity.

STANDARD OF REVIEW

Because the Benefits Review Board affirmed the ALJ's decision without adjudication pursuant to Public Law 104-134, we review the ALJ's decision directly. *Jones Stevedoring Co. v. Director,* OWCP, 133 F.3d 683, 687 (9th Cir. 1997). We must accept the ALJ's findings unless they are contrary to law, irrational, or unsupported by substantial evidence. *Kashuba v. Legion Ins. Co.,* 139 F.3d 1273, 1275 (9th Cir. 1998). Substantial evidence means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales,* 402 U.S. 389, 401 (1971) (*quoting Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)).

DISCUSSION AND CONCLUSION

Where an injured employee seeks benefits under the LHWCA, a treating physician's opinion is entitled to special weight. As we have explained in the context of Social Security cases, "[w]e afford greater weight to a treating physician's opinion because 'he is employed to cure and has a greater opportunity to know and observe the patient as an individual.' " *Magallanes v. Bowen,* 881 F.2d 747, 751 (9th Cir. 1989) (*quoting Sprague v. Bowen,* 812 F.2d 1226, 1230 (9th Cir. 1987)). The same logic applies in cases involving industrial injuries.

Section 907 of the LHWCA requires that employers furnish medical care to longshore and harbor workers injured on the job, and it specifically guarantees the right of employees to select their own doctors. While the Secretary of Labor is authorized under the Act to supervise

medical care rendered to injured employees, neither the employer nor the Secretary stands in loco parentis to injured employees. Nothing in the Act requires injured workers to abdicate the right to make their own decisions about their medical care. Although the employer is not required to pay for unreasonable and inappropriate treatment, when the patient is faced with two or more valid medical alternatives, it is the patient, in consultation with his own doctor, who has the right to chart his own destiny. *See* 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 13.22(e) (1998) ("In general, if claimant gets conflicting instructions on treatment from different doctors, and chooses to follow his or her own doctor's advise, this is not unreasonable.").

In the instant case, Amos's treating physician, Dr. Pedegana, an orthopedic surgeon with indisputable credentials, believed that surgery would help his patient. Drs. Sawyer and Sears, both well qualified orthopedic surgeons, favored a more conservative course. But neither Sawyer nor Sears established that Pedegana's recommendation was unreasonable. To the contrary, Dr. Sawyer opined that the surgery might offer Amos some symptomatic relief, and Dr. Sears acknowledged that his preference against surgery in Amos's case was not open-and-shut, but a judgment call. As the opinion of the treating physician, Dr. Pedegana's recommendation was entitled to special deference, and since that opinion was not shown by the testimony of the other doctors to be unreasonable, the ALJ's choice of one reasonable option over the other was not hers to make. It was the patient's. The

ALJ's rejection of Dr. Pedegana's surgical recommendation as not reasonable and appropriate was not supported by substantial evidence.

We remand to the ALJ with instructions to grant Amos's request for surgery and to redetermine, consistent with this opinion, Amos's entitlement to temporary disability benefits from February 13, 1992 pending his maximum medical improvement, and if appropriate thereafter, permanent disability benefits.

PETITION GRANTED. REVERSED AND REMANDED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
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Because the Benefits Review Board affirmed the ALJ's decision without adjudication pursuant to Public Law 104-134, we review the ALJ's decision directly. *Jones Stevedoring Co. v. Director,* OWCP, 133 F.3d 683, 687 (9th Cir. 1997). We must accept the ALJ's findings unless they are contrary to law, irrational, or unsupported by substantial evidence. *Kashuba v. Legion Ins. Co.,* 139 F.3d 1273, 1275 (9th Cir. 1998). Substantial evidence means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales,* 402 U.S. 389, 401 (1971) (*quoting Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)).

DISCUSSION AND CONCLUSION

Where an injured employee seeks benefits under the LHWCA, a treating physician's opinion is entitled to special weight. As we have explained in the context of Social Security cases, "[w]e afford greater weight to a treating physician's opinion because 'he is employed to cure and has a greater opportunity to know and observe the patient as an individual.' " *Magallanes v. Bowen,* 881

F.2d 747, 751 (9th Cir. 1989) (*quoting Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir. 1987)). The same logic applies in cases involving industrial injuries.

Section 907 of the LHWCA requires that employers furnish medical care to longshore and harbor workers injured on the job, and it specifically guarantees the right of employees to select their own doctors. While the Secretary of Labor is authorized under the Act to supervise medical care rendered to injured employees, neither the employer nor the Secretary stands in loco parentis to injured employees. Nothing in the Act requires injured workers to abdicate the right to make their own decisions about their medical care. Although the employer is not required to pay for unreasonable and inappropriate treatment, when the patient is faced with two or more valid medical alternatives, it is the patient, in consultation with his own doctor, who has the right to chart his own destiny. *See* 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 13.22(e) (1998) ("In general, if claimant gets conflicting instructions on treatment from different doctors, and chooses to follow his or her own doctor's advise, this is not unreasonable.").

In the instant case, Amos's treating physician, Dr. Pedegana, an orthopedic surgeon with indisputable credentials, believed that surgery would help his patient. Drs. Sawyer and Sears, both well qualified orthopedic surgeons, favored a more conservative course. But neither Sawyer nor Sears established that Pedegana's recommendation was unreasonable. To the contrary, Dr. Sawyer opined that the surgery might offer Amos some symptomatic relief, and Dr. Sears acknowledged that his preference against surgery in Amos's case was not open-and-

shut, but a judgment call. As the opinion of the treating physician, Dr. Pedegana's recommendation was entitled to special deference, and since that opinion was not shown by the testimony of the other doctors to be unreasonable, the ALJ's choice of one reasonable option over the other was not hers to make. It was the patient's. The ALJ's rejection of Dr. Pedegana's surgical recommendation as not reasonable and appropriate was not supported by substantial evidence.

Amos is entitled to temporary total disability benefits until the employer provides the requested surgery and it is determined that Amos has reached maximum medical improvement. We thus remand to the ALJ with instructions to grant Amos's request for surgery and award appropriate temporary total disability benefits.

PETITION GRANTED. REVERSED AND REMANDED.

U.S. Department of Labor

Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

Re: Sir Amos v. Sea-Land Services, Inc., Crawford & Company (Case No. 92-LHCA-3571) (OWCP No. 14-0102839, 14-0108034, 14-0109438, 14-0110096) (BRB No. 94-0892)

NOTICE FROM THE CLERK OF THE BENEFITS REVIEW BOARD

Pursuant to the provisions of Public Law 104-134 (Omnibus Appropriations for Fiscal Year 1996), enacted on April 26, 1996, appeals from decisions under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*, which have been pending before the Benefits Review Board for more than one year, shall, if not acted upon before September 12, 1996, be considered affirmed by the Board and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeal.

According to our records, the appeal in the instant case has now been pending at the Benefits Review Board for more than one year. Therefore, consistent with Public Law 104-134, this decision pending review by the Benefits Review Board is considered affirmed and shall be considered the final order of the Board for purposes of obtaining review in the United States courts of appeal. Attached please find an outline of the procedures for appealing to the courts of appeal.

DATE: SEP 12 1996

Sincerely

/s/ Thomas O. Shepherd, Jr./P.F.
Thomas O. Shepherd, Jr.
Clerk of the Board

U.S. Department of Labor

Office of Administrative Law Judges
211 Main Street – Suite 600
San Francisco, California 94105

Commercial (415) 744-6577
FAX (415) 744-6569

In the Matter of:	CASE NOS: 92-LHC-3571
SIR AMOS,	92-LHC-3572
Claimant,	92-LHC-3573
v.	92-LHC-3574
SEA-LAND SERVICES, INC.,	OWCP NOS: 14-102839
Employer,	14-108034
CRAWFORD & COMPANY,	14-109438
Administrator,	14-110096
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,	
Party-in-interest.	

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For the Director, OWCP

Before: ELLIN M. O'SHEA
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding arises under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* ("the Act"), and its implementing regulations at 20 C.F.R. Parts 701 and 702.

The case was heard in Seattle WA on 11/3/93. The previous scheduling had to be continued for fiscal administrative reasons. At hearing the private parties as well as the Director/Solicitor had full opportunity to present and argue their cases. Claimant's Exhibits 1-7 were admitted as were Employer's Exhibits 1-13.[1]

Stipulations and Issues

It was agreed the claimant's injury at issue occurred 7/25/90 in self-insured Sealand employment where the jurisdictional situs and status requirements of § 3(a)(1) and 2(3) and (4), respectively, were met. The parties

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[1] As used herein: CX = Claimant's Exhibits; EX = Employer's Exhibits and TR = Transcript.
CX 5-36, a photocopy of pg. 2 of the N.W. Therapy 10/25/91 evaluation report is not fully complete, its left side clipped.

agreed § 12 and § 13 are not in issue. While at hearing there was an AWW issue, by Mr. Metz hereby incorporated 12/22/93 letter the parties agree $656 is the AWW.

The claimant was paid compensation benefits as reflected in Form LS-208 for almost a year following injury and returned to Sealand work in 7/1991, working until 2/13/92. He has not worked since.

At issue is whether any compensable injury but to claimant's nose and face occurred in the course and scope of and arose out of the industrial injury claimant suffered 7/25/90, and specifically a right shoulder injury so as to entitle him to § 8 benefits as well as § 7 medical benefits based on these additional claimed injuries.

Also, the reasonableness and necessity of the medical treatment Dr. Pedegana has recommended is at issue, including a claim for payment of Dr. Pedegana's evidenced bill.

Nature and extent of disability since 2/13/92 is also at issue. The claimant contends his total disability remains temporary in nature absent the recommended surgery.

According to the Director, § 8(f) is to be decided only if it is found, in resolving the issues between the private parties of maximum medical improvement and the § 7 need for surgery, that permanency has been reached. Otherwise the Solicitor's position is the § 8(f) issue should be remanded to the Director for consideration.

Findings of Fact and Conclusions of Law

The worker 42 years old at hearing, went to the 12th grade, and has a GED. Following a year's electrician apprenticeship program in 1970, and never having worked as an electrician, he was employed in 1973 by Sealand. Thereafter and until 7/25/90 injury, he was Sealand's employee, first as a warehouseman-loader checker, then since 1978 off and on as a truck driver. As warehouseman-loader checker, the job in which injured 7/25/90, claimant loaded and unloaded containers and rails cars, strapped cargo onto, or removed cargo off flats, a flatbed, physical work as described.

On 7/25/90 the claimant was standing on a flat, four to five feet off ground level, or about shoulder level of the witnesses who testified. He was working to chain cargo onto the flat, chassis as described by the claimant, Doty and Carter, the claimant's witnesses; steel pipes as recalled by Coleman, employer's witness. It is agreed claimant suffered a nose and face injury when the cheater bar he was using to tighten and secure the load sprung up and hit his face, fracturing his nose. At issue is whether in the course of that occurrence the claimant, as he attested, stumbled and "fell down on the deck [of the flat] across the railroad tie", TR 36-37, and suffered the injuries to both his shoulders, his back and his neck of this claim. EX 1.4. That is all he remembers of the incident, he attested; he did not know where he was for awhile and lost consciousness.

Dr. Fulcher, the emergency room physician who treated claimant 7/25/90 recorded claimant stated he did not fall, he was struck on the nose and not otherwise

injured; that he had no loss of consciousness when struck, but did briefly lose reactivity. EX 2. Claimant attested he did not remember these questions being asked in the ER, and while at Sealand after injury he did not know where he was, and he was not really sure where he was when taken by ambulance to the ER. He remembers he told ER personnel his head was hurting, he could not really remember; and he could not answer any more of their questions. TR 37-38. Employer relies on Dr. Fulcher's recordations, and Coleman's testimony claimant did not fall in the incident to establish no injury to claimant's back and shoulders occurred in the 7/25/90 industrial incident. Claimant's witnesses attested otherwise.

Following 7/25/90 injury claimant was off work and on total § 8 compensation for a year. He returned to work 7/25/91 and ceased work on 2/13/92. He attested he ceased work in 2/1992 with pain shooting down his arm "my shoulder felt like it wasn't even my shoulder." TR 47. After seeing Dr. Pedegana, on Dr. Lewis' referral, the CAT scan and impingement surgery at issue was recommended. His attestions were he could do nothing really overhead due to the stiffness, pain and lack of strength in his right shoulder, and because he had no real strength, such as he had before, in his back, in his mid-back.

Claimant was seen 1/15/92 by Dr. Lewis his treating internist/sports medicine physician for his chronic right shoulder tendinitis with intermittent impingement syndrome, and his chronic intermittent lumbar muscular strain. Dr. Lewis, who had been treating claimant since 8/1990, then reported his injuries and complaints, albeit mostly subjective, were work-related for which further diagnostic or significant treatment regimen, other than a

good fitness program and use of therapeutic modalities, would not be useful. Working chest high to overhead with moderately heavy loads appeared to exacerbate both his.right shoulder impingement type syndrome and his low back. Dr. Lewis stated his 1/15/92 opinion was unchanged when claimant returned 2/12/92 with progressive right shoulder pain and tenderness after Sealand work requiring extensive arms' reaching, with occasional shoulder-height or above activities. However he took him off work until an orthopedic consultation to look at other right shoulder remedies was obtained. Dr. Pedegana's 2/20/92 examination followed. Dr. Lewis had earlier, on 5/21/91, decided not to follow through with a consultation by Dr. Pedegana when a right shoulder arthrogram was normal, and had released him for work return 5/24/91.

Occurred in Course and Scope and Arose Out of

When chaining the load to the flat on 7/25/90 the claimant was working on the rear of the flat, or trailer. Coleman, a casual that night, was also on the approximate 30' long flat, at the flat's front end. They were variously estimated to be about 18' to 30' away from each other, on the same side. TR 103-104. The flat is described as about 7' wide, the width of the chassis load on the flat 4'.

Doty a Sealand loader-checker has been claimant's friend for 20 years, the length of Doty's Sealand employment. He was engaged on the same flat-loading job as claimant and Coleman. He worked on the other side of the flat from claimant and Coleman. Doty worked with

claimant at the flat's rear, across on the other side of the flat in a joint operation to secure the belly chains around the chassis load and to affix the load at that end. According to Doty he was on the flat, across from and working with claimant on the rear end chaining and tightening action and he could see through the chassis and the "lot of clearance" provided by the 4 x 4s wedges between the chassis, with "alot [sic] of vision there . . . clear vision". TR 84. He explained how he had to be able to see claimant through the load and 4 x 4s, as he described the chaining tightening operation, in order to safely work together to accomplish the task.

Doty attested he saw the tightened cheater binder give way, pop back and hit claimant in the face, he watched the bar hit claimant. He attested he actually saw claimant down, saw him fall back on a 12 x 12[2], saw him fall on his back and shoulders. TR 75-80.

> Well, I seen him falling, falling back on a 12-by-12. And I says, "Well, hold it." I jumped out. somebody else was on the other side, I don't know exactly who it was. But anyway, I jumped down, ran as fast as I could to the other side, the other guy was holding on to him because he was in such pain he was about to roll off the thing. And I made it over just in time to catch him and got him back up on the flat. TR 78.

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[2] 12 x 12s were described as used for dunnage or spacers, to keep loads off the flatbed's deck when it goes aboard ship, four of which were on the flat's deck, for use in securing the loaded cargo. The 4 x 4s are used between the chassis, when loaded on the flatbed. TR 79.

According to Doty, he made it around from his side of the flat to claimant "fast enough to catch him. Somebody else was there, holding him because he was going this way, and that's like about a six-foot drop." TR 80.

The testimony of Doty and Coleman indicates it was Coleman Doty saw holding claimant, and the import of the testimony of both is that Coleman reached claimant before Doty. TR 83. Coleman attested he heard a yell and heard the cheater bar used in the chain tightening operation fall to the ground. He then saw claimant holding his face. Coleman got to claimant as fast as he could to catch him, moving down the available footage on the flat to stop his fall to the pavement. "I got back there as he was going down." TR 96-100. Coleman attested he helped claimant get down into a somewhat safe position on the edge of the flat so he would not roll off, holding him and standing up against him, so he would not fall off the flatbed's edge.

There was, by Coleman's recollection, a 4 x 4 not a 12 x 12 in the claimant's vicinity on the edge of the flat where he ultimately was laid to await removal. Claimant was removed from the flatbed trailer by being eased onto a pallet brought by forklift to where he laid. By Coleman's recollection only claimant's feet laid across the 4 x 4 post.

Coleman remembered Doty's presence in connection with the incident. He did not recall Carter's, but recalled other workers in the vicinity of the chaining activities that night. He attested he and claimant were the only two working on the flat at the time.

Carter, a since retired Sealand loader-checker, has not socialized with claimant since 7/20/90. He testified he was on the ground, beside the flat the claimant was chain tying, four feet away from claimant at the time of the injury. He observed the binder hit claimant's forehead in the tightening operation. He attested he saw claimant fall backward and hit the rear of his head and his shoulder area when he landed on the chassis atop the flat.

While Carter testified he had a clear vision of the event and claimant's fall, Carter's testimony as to where he was located vis-a-vis claimant was imprecise and confusing at times TR 90, 91:1; and either unclear or conflicting with those of the other witnesses as to what he, claimant, Doty and Coleman were doing, where, in the chain binding events, TR 90:11-25. The precision of his memory has been affected, to some extent, by time's passage. Thus while it is not doubted Carter was on the scene, little weight can be afforded to his recollection that claimant fell and hit his head and shoulders.

However, when the overall picture the witnesses presented as to the operational circumstances of the flatbed chaining activities are weighed, including where Doty and Coleman were located, what they were doing, what Doty attested he saw, what Coleman had to do to get to claimant first, just as Doty arrived, which impliedly necessitated his attention and eyes off claimant to safely make his way down the 2' perimeter of the flat, the factfinder must hold the testimony of these two witnesses is equally probative. This was also the impression from their demeanor and representations at hearing. As between them claimant must be afforded the benefit of the doubt on the question of whether his shoulders and

back were affected by the 7/25/90 injury, by the fall he and Doty attested to, and/or by whatever occurred on the edge of the flat.

The testimony of both Doty and Coleman while contradictory as to a fall on shoulders and back, does indicate that in this event claimant's body was maintained on the very limited perimeter space of the flat, in very physical, emergency-hectic circumstances. These are circumstances from which it is not unreasonably to infer his shoulders and back could have been or were affected in some fashion until he was laid down safely. Dr. Fulcher's recordations of claimant's denial of fall or other than the nose injury have been weighed. But it is also fact that Carter, who it is not doubted spoke with claimant at the accident scene, thought him semi conscious. While Doty thought him coherent, Coleman thought him disoriented. Thus here too, all doubts enuring to claimant's benefit, these recordations are not afforded the weight of Doty's attestations, given claimant's recollections of his state, physical and mental, on ER treatment.

The issue here is whether the claimant sustained harm to his shoulders and back in the 7/25/90 industrial injury. The § 20(a) presumption is applicable to the claim. The claimant has established shoulders and back harm by Dr. Verrillis' 7/31/90 report, six days post-injury. He has also established a work injury 7/25/90 which by Doty's credible testimony could have caused the harm. The claimant has presented his § 20(a) *prima facie* case for injuries to shoulders and back 7/25/90. Employer has presented probative rebuttal evidence otherwise. However on a weighing of all the evidence, including the equally probative Doty and Coleman, the claimant must

be afforded the benefits of all doubts under this Act. Thus causation must be found.

The circumstances of the injury event as described, weighed with the evidence pro and con, including two equally credible witnesses who have conflicting recollections of what occurred indicates to the factfinder that on the causation issue it must be found and concluded that in the 7/25/90 work injury the claimant injured his shoulders and back.

Surgery Recommendation – Disability

Following Dr. Pedegana's surgery recommendation employer had claimant evaluated by two other Board certified orthopedic surgeons. In 8/1992 Dr. Kenneth Sawyer diagnosed symptoms and physical findings suggestive of right shoulder subacromial impingement. He opined that while the recommended right shoulder surgery may improve the claimant's right shoulder symptoms it was unlikely he would be asymptomatic as a result. Dr. Sawyer opined that because the surgery Dr. Pedegana proposed would probably not make claimant's shoulder totally asymptomatic, it was also unlikely claimant would be able to tolerate returning to his previous work if he could not currently do so because of ongoing back and shoulder symptoms.

Dr. Sawyer's evaluation was of claimant's pain in both shoulders and in his right and left upper back areas referable to a 11/18/91 on-the-job injury or flare-up. Dr. Sawyer's causation opinions were directed to the 11/18/91 work incident which claimant told him was simply doing his regular work, with no particular

trauma. However, Dr. Sawyer's examination history elicited full details as to all of the claimant's back and shoulders' history, including the 7/25/90 injury, the flare-ups of the 9/19/91, 11/18/91 events reflected in Dr. Lewis' records, the 2/12/92 work event which led Dr. Lewis to seek Dr. Pedegana's consultation. Thus Dr. Sawyer's medical examination and evaluation was essentially and in total a full consideration of the overall state of claimant's stated current back and shoulders' condition though his causation opinion was elicited as to the 11/18/91 events.[3]

Dr. Stephen Sears following 4/7/93 examination and review of the 1992 tomogram Dr. Pedegana secured stated he did not feel claimant had a right shoulder impingement syndrome. He did not believe the tomogram's spur was significant and he did not feel the claimant would benefit from Dr. Pedegana's recommended right shoulder surgery. He did not believe he would be any better from surgery. He diagnosed strains of the

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[3] This matter bears four OWCP-LHCA claim numbers emanating from the 7/25/90, 9/19/91, 11/18/91, and 2/12/92 events. The parties agreed that the injury at issue here is the 7/25/90 event.

Per Dr. Lewis at CX 3:

11/18/91 – Working on car ramp pushing and pulling suffered current lumbar injury. More significantly aggravated right shoulder because of overhead work in the cold.

9/19/91 – Returned to work 9/3/91 through 9/19/91 without problem. While lifting 900 50# fish boxes, developed low back pain without radiation.

shoulders, right greater than left, and chronic thoracolumbar strain with which claimant could work without restrictions.

On the disputed issue of the reasonableness and necessity of this surgery, under § 702.401 of the Act, 20 C.F.R., Dr. Pedegana testified by deposition at CX 7, Dr. Sears at EX 12.

There is no question Dr. Pedegana's expenses as billed at CX 2 constitute reasonable necessary expenses under § 702.401 20 C.F.R. to be paid by employer. It is understood from employer's statements at hearing that on Dr. Lewis' referral this specialist's consultation and involvement as treating orthopedic surgeon would be approved. 20 C.F.R. § 702.406. TR 24-26. This bill is found payable under § 7.

It is employer's position however, in addition to its position the recommended surgery is unnecessary, that while this forum under § 7(d) can order reimbursement for the costs of necessary medical care not provided by employer, and can generally order employers to provide future medical treatment, under *McCurley v. Kiewest Company*, 22 BRBS 115 (1989) and *Anderson v. Todd Shipyards*, 22 BRBS 20 (1989), the District Director has sole authority to oversee the provision of medical care. This forum has authority only to resolve factual issues concerning the payment of past incurred expenses according to employer, and cannot order the claimant-requested surgery, the issue which brings the matter to this forum, if it is found reasonable and necessary on resolution of this contested issue.

This is not the ALJ's interpretation of the BRB's statements in these cases. While claimant has made no written response to employer's 12/22/93 statements, his representation as understood at hearing, was that he is entitled to his orthopedist's recommended surgery as a reasonable and necessary medical expense, a surgery which at the least will improve his symptoms. Dr. Pedegana attested, based on reasonable medical probability and his extensive experience in performing the surgery he recommends, that it is probable it would improve claimant's symptoms and physical function, and based on the 7/90 injury history claimant gave him he related his shoulders' symptoms onset to 7/90, with the spur probably present pre-injury.

To some degree the analysis and evaluation of the disputed § 7 issue overlaps that on the issue of nature and extent of disability. It requires a judgment on the relative probative and persuasive weight of the conflicting medical opinions, and particularly Dr. Pedegana's and Dr. Sears. On analysis Dr. Sears' opinions are found more probative and persuasive and when Dr. Sears' opinions are considered and weighed with all the evidence, they are found determinative of the issues.

Dr. Pedegana attested that given the right shoulder tomogram results he secured, the CAT scan he requested earlier, not approved by employer, would not be appropriate at this time. Further, there is nothing in Dr. Sears' more persuasive opinions to indicate the CAT scan request of this claim is an appropriate reasonable § 7 medical expense. It is so found and concluded.

The fact Dr. Pedegana is involved with claimant on a treating basis, based on Dr. Lewis' request, has been weighed in this evaluation, as has the fact employer's consultants examined and evaluated in connection with a controverted and litigated claim. However, Dr. Sears' opinions were based on a detailed consideration of the reports on the claimant's past medical and orthopedic treatment history, including Dr. Lewis', Dr. Sears had a far fuller appreciation of the claimant's medical background and details. Dr. Pedegana testified he had only Dr. Lewis' evaluations. Other than Dr. Lewis' 11/15/92 note shortly before his 1993 referral. Dr. Pedegana did not identify which records he had or whether they covered Dr. Lewis' entire treatment period.

Additionally Dr. Sears' report reflects a far fuller elicitation of the claimant's complaints and history, a far fuller medical and orthopedic examination, inclusive of his back. Dr. Pedegana's reports appear more limited and cursory in comparison. Then Dr. Pedegana did not know what claimant's back condition was. Albeit Dr. Lewis referred him for right shoulder consultation only, Dr. Pedegana focused solely on his shoulders although claimant reported his 7/25/90 mid-back injury to him. Dr. Sears considered the claimant's total orthopedic conditions, singly and in combination. Dr. Pedegana did not.

Further, Dr. Sears' evaluation is more current than that of Dr. Pedegana a year earlier, and is the most current in the records. Dr. Pedegana testified he would have to preface his opinions, including that absent surgery he would restrict claimant's shoulders to below shoulder level activity, i.e., no overhead work including pushing and pulling overhead, by the fact he had not

seen him in over a year and did not know his current condition.

Moreover, Dr. Sears' explanations on deposition impressed as reflecting not only a fuller appreciation for claimant's total past orthopedic treatment and medical history, and a more detailed orthopedic examination, but also a more thoughtful, careful weighing of all he was presented with to reach judgments as to whether claimant had an impingement syndrome as well as whether any restrictions should be placed on his work abilities given the shoulders and back strains he diagnosed. The chronic symptoms claimant said he had, where objectively the examination findings were normal, were weighed by Dr. Sears and notwithstanding Dr. Pedegana's attestions as to the effect of inactivity on an impingement syndrome's symptoms and his provocative test findings, Dr. Sears' opinions are overall more persuasive; his diagnosis more persuasive. Dr. Sawyer's 1992 diagnosis was suggestive only, and does not detract from the persuasive weight of Dr. Sears' diagnoses, or from Dr. Sears' testimonial explanations.

Additionally, claimant's testimony indicated his shoulders' symptoms have not improved with inactivity, a red flag according to Dr. Sears. Dr. Sears who knew the nature of claimant's work activity based on his review of the medical treatment reports, opined he can return to the work he was doing. Dr. Sawyer's statements as to his tolerance for his usual work is based solely on claimant's stated symptoms, and does not detract from Dr. Sears' analysis.

While Dr. Sears may treat and practice in eastern WA and Dr. Pedegana's CV is impressive, both are Board-certified and what is more weighty in analysis is the thoroughness and completeness of the expert's examination and report on the particular injured worker. The foundation for his opinions in knowledge and review of the worker's past orthopedic history carries significant persuasive weight, as well as how he presents and explains in testifying. on these bases Dr. Sears is more persuasive on both the § 7 disputed proposed surgery issue, an issue which in turn depends on which diagnosis is more probative and persuasive. Dr. Sears' are. Dr. Lewis is not an orthopedic surgeon. However, Dr. Lewis' 1/15/92 opinions fit in with Dr. Sears' persuasive conclusions.

When examined on 11/8/1991 by a neurologist, Dr. Grisham, and orthopedic surgeon Dr. Cramer, the latter having examined him twice previously on a consultative basis for employer (1/30/91, 7/9/91), the former once before on 7/9/91, these specialists were of the 11/8/1991 opinion that with his skeletal strains and bilateral shoulder pain associated with the 7/25/90, and 9/91 work incidents, claimant probably did not need to be burdened with physical restrictions. They also indicated he may well do better in his work if he were in better condition, accomplished by a self-directed exercise program. While these specialists' opinions claimant could perform his usual work, the exertional demands of which were known to them from claimant's descriptions, predated the events which resulted in his 2/1992 work cessation and the spur on tomogram, these experts' opinions are

not dissimilar to Dr. Sears' analysis of claimant's ability to perform his usual work, including with his symptoms.

It is these evaluating experts' opinions, in conjunction with Dr. Sears' opinions, which carry determinative weight on claimant's abilities for his usual work with his related symptomatology. Dr. Sawyer's evaluation for the effect of the 11/18/91 work incident which occurred ten days following Drs. Cramer/Grisham's 11/8/92 evaluation, is not viewed as expressing his opinion claimant cannot do his usual work. Rather, it expresses what claimant says he cannot do based on his symptoms. This is similar to Dr. Sears' opinion from review of his past medical history that claimant will continue to have complaints on work return, although not restricted from such work. This also fits in with Drs. Cramer/Grisham's 7/71 opinions, and with Dr. Lewis' 1/15/92 statements, his 1/13/92 EX 3.24 statements, and his 3/4/92 observations at EX 3.24(A).

Vocational Evidence

The employer's presented the vocational testimony of L. Kent Shafer the VE who did the vocational assessment and labor market surveys of EX 10. Were it to be found claimant could not perform his usual work, and that he was functionally limited as reflected in Dr. Pedegana's attestions, and in Dr. Lewis' PCE of 6/6/1993, limited to medium work by the latter, this presentation establishes that within the claimant's geographical area there was suitable alternate employment available to him. Dr. Lewis as well as Dr. Sears approved the positions of microfilm technician trainee, on-call rider, information

specialist, telemarketer, extruder operator, and hand packager. Dr. Lewis did not respond as to the cashier position which Dr. Sears indicated he can perform and which I find he can so perform. These available jobs paid $6 to $9.45 to $10 an hour, which adjusted to 1990 wage levels would, in Shafer's opinion, pay approximately $5.45 to $9.10 per hour. Based on this vocational expert's experience these jobs were earlier, and prior to his 4/1993 involvement, always available in most urban labor markets.

By claimant's testimony he sought all of the jobs Mr. Shafer advised him were open and he was offered a job by none. However Mr. Shafer had feedback from one upset prospective employer claimant contacted. This employer indicated he would not be asked back for an interview because he had not completed all items of their application. There is no indication claimant on his own has sought any work since 2/1992.[4]

Claimant's attestions as to his. efforts in following up Mr. Shafer's job leads, as well as whether he believes he could do the work represented by these jobs, did not impress as reflective of willingness to perform work which Drs. Lewis and Pedegana opined he presently has the capacity to perform absent surgery. Additionally his testimony overall did not credibly persuade or establish that with his symptomatology he is unable to perform the

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[4] The record at EX 1.8 indicates he was referred 4/1991 for OWCP sponsored selective placement rehabilitation, 20 C.F.R. § 702, Subpart E, and was as of 10/22/1991 rehabilitated to his pre-injury Sealand job. This was not otherwise explained at hearing.

work Dr. Sears attested he could do, and which Drs. Grisham and Cramer indicated he could do.

Thus while respondents have persuasively established an alternate earnings capacity in the event it were found he could not do his usual work activity, for the reasons indicated above, by the more persuasive of the conflicting medical evidence it is found he can perform his usual work activities absent surgery. It is also found the recommended surgery is not reasonable and appropriate.

Therefore on a § 8(h) consideration, (whether under § 8(c)(21) or § 8(e)) it could be found and concluded that claimant's absence of any actual earnings since 2/1992 does not fairly and reasonably represent his wage earning capacity and that on the presented evidence found persuasive, claimant has not established an award of disability is in order under either of these statutory sections since last paid compensation benefits or since 2/1992. The burden of establishing such is the claimant's.

So analyzing, the factfinder has also weighed the fact Dr. Sears attested he would credit acute symptoms which would warrant a few weeks of light duty and rest, but not chronic symptoms. The claimant's treating records reflect acute irritation incidents. While claimant's attestions at hearing at points gave pause as to credibility, the medical treatment records indicate he does have some credible subjective complaints with some work activities and in some circumstances. While of the impression claimant is not totally believable, by Dr. Sears' testimony he could have some post-injury acute right shoulder incidents and such are reflected in his treatment records. While their

length and effect after his 1991 work return are not totally believable, the impression of some residual shoulder effects on an acute basis is not totally disbelievable. There is however no credible evidence of back, left shoulder or neck problems residual to 7/25/90 injury.

Giving the claimant the benefit of every doubt, I find and conclude that these acute right shoulder incidents where he suffers subjectively and loses work time as a result warrants a wage loss disability award of five percent of his $656 AWW. He retains a wage earning capacity of $623.20. 2/3rds of this wage loss results in a weekly compensation rate of $21.87 ($656 - $623.20 = $32.80 ÷ 2/3rds = $21.87). I so find and conclude.

Permanency

Permanency under this Act is achieved when maximum medical improvement is reached. If the worker is no longer undergoing treatment with a view towards improving his condition, or he has a disability or condition which has continued for a lengthy period and appears of lasting or indefinite duration as distinguished from one in which recovery merely awaits a normal healing period, permanency has also been found under this Act. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 404 F.2d 1059 (5th Cir. 1968), 394 U.S. 976 (1969).

The absence of recommended surgery, even when no contrary recommendation has been made, does not necessarily determine this issue as claimant urges. Rather it is a consideration of all the facts in a particular case under all the case law criteria on permanency under this Act.

Here Drs. Grisham and Cramer opined claimant's condition fixed and stable 11/8/91, and on review of the record several months after his 7/25/1991 work return, this appears an appropriate point for determining permanency under this Act. It is so found. His condition, its ebbs and flows, continued unchanged thereafter, despite Dr. Lewis' treatment including PT, and it appeared lasting and indefinite. As of 2/3/1992, the date from which benefits are claimed here claimant is entitled to § 8(c)(21)(h) compensation of $21.87 weekly.

§ 8(f)

Dr. Sawyer, similar to all the reports on claimant's back complaints over the years, found little objectively on his back. When initially evaluated in 1/1991 claimant had dated his back complaints to a 1983 industrial injury. While claimant has stated he lost a protracted period of work time due to this 1983 injury there is no manifest evidence such was so.

Claimant has been through extensive physical therapy before and after the 7/25/90 injury. While the pre-1990 evidence manifests this therapy treatment, and that as recently as the spring of 1989, as well as in 4/1990 he was receiving PT with continuing complaints of back pain including dorsal and thoracic pain, particularly related to his work activities, the physicians' reports and opinions do not reflect a significant back problem objectively, with little degenerative change. They reflect many complaints over the years, much medical attention

through his Group Health provider, and Providence Hospital impressions of back strains, with discussions as to claimant finding work which does not strain his back.

As with the medical reports on the several driving accidents claimant had pre-7/1990, with resulting back pain, there is little in the way of objective evidence of any significant back problem in this evidence. Dr. Gilmore in 1989 reported claimant had had full orthopedic work-up including consultations by several orthopedists with no abnormalities of significance diagnosed. Even on post-7/25/90 back x-rays he had but minimal degenerative change. His preinjury records do indicate, as employer argues, that claimant did not always follow the medical advice his pre-1990 providers recommended, and he did indicate he was miserable with his employer's physical demands.

It is arguable whether a review of these manifest pre-1990 records reflect to an employer a serious lasting pre-existing disability. The examining physicians' reports did not reflect serious conditions found on investigation, and there is no manifest evidence claimant lost significant time from work due to his myriad complaints over the years. His stated symptoms were irritating to him according to the medical reports, but not disabling.

Is such evidence a permanent partial disability under *C&P Telephone Co. v. Director, OWCP,* 6 BRBS 399? Under *C&P Telephone Co.,* it appears that whether in fact the worker has, by medical opinion, such a physical disability on investigation of complaints should determine whether an employer would be motivated to discharge.

Rather than whether on what is reflected here, the continual albeit intermittent back complaints over the years, an employer would be motivated to discharge. I find that absent significant findings on all these investigations and treatments over the years, a pre-existing permanent partial orthopedic disability under *C&P Telephone Co.* cannot be found manifest.

However were such found to constitute a manifest pre-existing permanent partial disability, the following would hold. These pre-1990 records reflect little in the way of shoulder complaints and it is the shoulder complaint component of the 7/25/90 injury which by the medical evidence here affects claimant's ability to work, although claimant would represent both do. Further it is solely the shoulder component of his subjective complaints and the 7/25/90 injury which are the basis of the award reached above. It cannot be found that pre 7/25/90 claimant had any manifest pre-existing permanent partial disability of his shoulders.

Additionally there is no medical or other evidence here which addresses the question of whether the claimant's disability, as inferred and found from Dr. Sears' acute incidents statements, is solely due to 7/25/90 injury and if such post-injury disability is materially and substantially greater than that which would have resulted from the 7/25/90 injury alone, due to any pre-existing right shoulder condition. Employer's § 8(f) Application does not by evidence or rationale EX 11, pg. 13, provide any support for a holding to this effect.

Thus it cannot be found the requirements of § 8(f) were met. It cannot be found the right shoulder disability

is not due solely to the 7/25/90 injury and that the claimant had a pre-existing permanent partial disability which resulted in the disability from claimant's post-7/25/90 injury being materially and substantially greater.

§ 8(f) relief is found and concluded to be inapplicable.

Attorney Fees

The claimant's counsel shall within twenty days of the date of this Decision and order file a documented fee petition and bill of costs in accord with 20 C.F.R. § 702.132 of the Act, for services rendered since 9/15/92 (Form LS-18), with proof of service on respondents. Respondents' counsel then has twenty days thereafter to file any comments/objections.

Based on the above findings of fact and resulting conclusions of law it is ORDERED:

ORDER

1) Respondents based on the compensable 7/25/90 injury in their employ shall pay claimant permanent partial disability. compensation benefits of $21.87 weekly beginning 2/13/92 and continuing.

2) Interest shall be paid by respondents at the rate set forth in 28 U.S.C. § 1961 on the unpaid compensation benefits ordered above, computed from the date due to the date paid.

3) Respondents' § 8(f) application is denied.

4) Respondents under § 7 of the Act shall pay or reimburse the reasonable and necessary medical expenses claimant incurred in the care and treatment of the 7/25/90 injury he suffered in their employ, reflected at CX 2, the $432 bill of Dr. Larry R. Pedegana.

5) Respondents are under § 7 of the Act liable for any future reasonable and necessary medical expenses, established as resulting from the claimant's 7/25/90 injury.

6) The right shoulder surgery recommended by Dr. Pedegana in 1992, and CAT scan, is not under § 7 of the Act reasonable and appropriate medical treatment for the compensable industrial injury, and the request for such is denied.

/s/ Ellin M. O'Shea
ELLIN M. O'SHEA
Administrative Law Judge

Dated: FEB 16 1994
San Francisco, California

EMO:brt

5 U.S.C.

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

. . . .

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

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5 U.S.C.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a

party, and due account shall be taken of the rule of prejudicial error.

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33 U.S.C.
§ 907. Medical services and supplies

. . . .

(b) Physician selection; administrative supervision; change of physicians and hospitals. The employee shall have the right to choose an attending physician authorized by the Secretary to provide medical care under this Act as hereinafter provided. If, due to the nature of the injury, the employee is unable to select his physician and the nature of the injury requires immediate medical treatment and care, the employer shall select a physician for him. The Secretary shall actively supervise the medical care rendered to injured employees, shall require periodic reports as to the medical care being rendered to injured employees, shall have authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished, and may, on his own initiative or at the request of the employer, order a change of physicians or hospitals when in his judgment such change is desirable or necessary in the interest of the employee or where the charges exceed those prevailing within the community for the same or similar services or exceed the provider's customary charges. Change of physicians at the request of the employees shall be permitted in accordance with regulations of the Secretary.

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33 U.S.C.

§ 919. Procedure in respect of claims

(a) Filing of claim.

Subject to the provisions of section 13 [33 USC § 913] a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the commission [Secretary of Labor] at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

. . . .

(d) Provisions governing conduct of hearing; hearing examiners.

Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of section 554 of title 5 of the United States Code [5 USC §§ 554]. Any such hearing shall be conducted by a [an] administrative law judge qualified under section 3105 of that title [5 USC § 3105]. All powers, duties, and responsibilities vested by this Act, on the date of enactment of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 [enacted Oct. 27, 1972], in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

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33 U.S.C.

§ 921. Review of compensation orders

. . . .

(b) Benefits Review Board; establishment; members; chairman; quorum; voting; questions reviewable; record; conclusiveness of findings; stay of payments; remand.

. . . .

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

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20 C.F.R.

§ 702.407 Supervision of medical care.

The Director, OWCP, through the district directors and their designees, shall actively supervise the medical care of an injured employee covered by the Act. Such supervision shall include:

(a) The requirement that periodic reports on the medical care being rendered be filed in the office of the district director, the frequency thereof being determined by order of the district director or sound judgment of the attending physician as the nature of the injury may dictate;

(b) The determination of the necessity, character and sufficiency of any medical care furnished or to be furnished the employee, including whether the charges made by any medical care provider exceed those permitted under the Act;

(c) The determination of whether a change of physicians, hospitals or other persons or locales providing treatment should be made or is necessary;

(d) The further evaluation of medical questions arising in any case under the Act, with respect to the nature and extent of the covered injury, and the medical care required therefor. [38 FR 26861, Sept. 26, 1973, as amended at 50 FR 402, Jan. 3, 1985]

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20 C.F.R.
802.301 Scope of review.

(a) The Benefits Review Board is not empowered to engage in a de novo proceeding or unrestricted review of a case brought before it. The Board is authorized to review the findings of fact and conclusions of law on which the decision or order appealed from was based. Such findings of fact and conclusions of law may be set

aside only if they are not, in the judgment of the Board, supported by substantial evidence in the record considered as a whole or in accordance with law.

(b) . . . .